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UNITED STUDENT AID FUNDS, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHYRIAA HENDERSON,

Plaintiff,

v.

UNITED STUDENT AID FUNDS,
INC.,

Defendant.

Case No. 3:13-cv-1845

**DEFENDANT UNITED
STUDENT AID FUNDS, INC.'S
REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

Hon. Janis L. Sammartino

Hearing date: February 8, 2017

Time: 1:30 p.m.

Location: Courtroom 4A

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I. INTRODUCTION

Very simply, USAF is entitled to summary judgment here, and Henderson's Opposition does nothing to persuade otherwise.¹ For instance, Henderson attempts to create a distinction between "insured" federal student loans and "guaranteed" federal student loans in order to argue that the Budget Act Amendment does not exempt the calls in this case from liability under the TCPA. However, in so doing, Henderson relies only on a single footnote from a recent FCC ruling, which is neither dispositive nor in accord with other authority (much less with Congress' intent in enacting the Budget Act Amendment).²

Further, Henderson cannot avoid the straightforward application of the law of agency here. While it is true, as Henderson notes, that questions of agency often are fact-intensive, this case presents the exception to the rule. As demonstrated in the Motion, USAF's loan servicing relationship is with NSI, NSI retained the Collectors and the Collectors made the telephone calls at issue. Against this background, and as a matter of settled law, no theory of agency supports Henderson's claims against USAF.

II. ARGUMENT

A. The Budget Act Amendment Squarely Applies Here, And Henderson's Claims Fail.

As noted above, in attempting to avoid the effect of the Budget Act Amendment, Henderson purports to draw a distinction between "federally insured" loans and "federally guaranteed" loans. According to Henderson, the Budget Act Amendment would apply to a guaranteed loan, but not to an insured loan, and ED supposedly is only an insurer of FFELP loans. Notably, this is Henderson's only argument against the Budget Act Amendment in this action. Henderson does not

¹ Terms shall be used herein as defined in the Motion, unless otherwise noted.

² In re Rules & Regulations Implementing Telephone Consumer Protection Act of 1991 (FCC 16-99), issued on August 11, 2016 (the "FCC Rulemaking").

1 dispute that her loans were originated under the FFELP, nor does she dispute that
2 the Budget Act Amendment applies retroactively. Accordingly, Henderson has
3 waived these and any other arguments that might exist. See, e.g., City of Arcadia v.
4 EPA, 265 F. Supp. 2d 1142, 1154 n. 16 (N.D. Cal. 2003) (“[T]he implication of this
5 lack of response is that any opposition to the argument is waived.”).

6 In any event, Henderson’s proffered distinction is one without a difference –
7 i.e., the terms “insured” and “guaranteed” are used interchangeably to describe
8 ED’s role after a defaulted student loan has been paid by a guaranty agency, like
9 USAF here. Thus, the supposed distinction does not exist as a matter of law, nor
10 would it make sense anyway.

11 Indeed, the FFELP is comprised of a complex statutory and regulatory
12 scheme that, in addition to ED’s guarantee, contains an insurance component. See
13 Gill v. Paige, 226 F. Supp. 2d 366, 369 (E.D.N.Y. 2002) (“Under the [FFELP], the
14 federal government provides a public guarantee and insurance system.”).
15 Moreover, a defining feature of the FFELP is the federal government’s entry “into a
16 guaranty agreement with . . . a guaranty agency, whereby the [Secretary of ED
17 would] undertake to reimburse it . . . with respect to losses (resulting from the
18 default of the student borrower).” 20 U.S.C. § 1078(c)(1)(A) (“The guaranty
19 agency shall be deemed to have a contractual right against the United States, during
20 the life of such loan, to receive reimbursement according to the provisions of this
21 subsection.”). Thus, no matter how ED’s role is described, it is ultimately
22 responsible for repayment of defaulted FFELP loans. That is the point here, which
23 courts frequently have noted. See, e.g., Weber v. Great Lakes Educational Loan
24 Services, Inc., No. 13–cv–00291–wmc, 2013 WL 3943507, at *3 (W.D. Wis.
25 July 30, 2013) (“the federal government committed to guarantee student loans
26 issued by private lenders”); Oklahoma Firefighters Pension & Ret. Sys. v. Student
27 Loan Corp., 951 F. Supp. 2d 479, 484 (S.D.N.Y. 2013) (stating that, under the
28

1 program, “[s]tudents were required to meet strict [ED] criteria to qualify to receive
2 [FFELP] loans” and, in turn, “the federal government guaranteed . . . [FFELP]
3 loans”); U.S. Bank Nat. Ass’n v. Education Loans, Inc., No. 11–1443 (RHK/JJG),
4 2011 WL 5520437, at *1 (D. Minn. Nov. 14, 2011) (“loans . . . are guaranteed and
5 subsidized by the federal government under the [FFELP]”); United States v.
6 Emanuel, No. 09–cv–185–SM, 2009 WL 4884482, at *1 (D.N.H. Dec. 10, 2009)
7 (explaining that certain “notes secured repayment of student loans authorized by the
8 [FFELP],” and that “the United States guaranteed repayment of the notes.”); Chae
9 v. SLM Corp., 593 F.3d 936, 944 (9th Cir. Cal. 2010) (“By covering student loans
10 with layers of insurance and guarantees, Congress encourages private lenders to
11 help fund higher education.”).

12 Thus, not only is Henderson’s argument (based entirely on the single
13 footnote) unsupported by law, it runs counter to Congress’ very purpose in enacting
14 the exception — to reduce credit risk and financial losses to ED and enhance the
15 ability to collect what is, at the end of the day, taxpayers’ money. Again, in the
16 lead-up to the Bipartisan Budget Act’s passage, ED issued a report calling on
17 Congress to “change the law to ensure that servicers [of student loans could]
18 contact borrowers using modern technology.” See “Strengthening the Student Loan
19 System to Better Protect All Borrowers,” U.S. Department of Education, October 1,
20 2015, at p. 16 (last viewed Dec. 13, 2016).³ In the report, ED argued that:

21 If servicers are able to contact a borrower, they have a much better
22 chance at helping that borrower resolve a delinquency or default.
23 Many student loan borrowers, especially those that may just be
24 graduating, move frequently in addition to no longer having landline
25 phone numbers. As such, it can be difficult for servicers to find a
26 borrower except by using a cell phone number. Current Federal law
prohibits servicers from contacting borrowers on a cell phone number
using an auto-dialer unless the borrower has provided explicit consent

27 ³ Available at: [http://www2.ed.gov/documents/press-releases/strengthening-](http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf)
28 [student-loan-system.pdf](http://www2.ed.gov/documents/press-releases/strengthening-student-loan-system.pdf).

1 to be contacted at that number. With phone numbers changing or
2 being reassigned on a regular basis, it is virtually impossible for
3 servicers to use auto-dialing technology. The President's 2016
4 Budget proposed amending this law to allow the use of automated
5 dialers to contact borrowers to inform them of their federal repayment
6 obligations and benefits like Pay As You Earn, or Rehabilitation, in
7 the case of a defaulted borrower.

8 Id. (emphasis added.)

9 In addition, Plaintiff makes too much of the footnote in the FCC Rulemaking.
10 The footnote states that “[c]ommenters who advocate for including ‘insured’ debts
11 within the language of the Budget Act amendments do not explain how the
12 statutory terms ‘owed to or guaranteed by’ encompasses the term ‘insured,’ so we
13 do not include ‘insured’ debts within the scope of the terms ‘owed to or guaranteed
14 by’ in our interpretation of the statutory language.” FCC 16-99, p. 9 n. 54. This is
15 not a statement that the FCC examined and decided the issue. To the contrary, this
16 is a statement that the issue was not examined at all.⁴

17 Furthermore, even if the FCC’s footnote could be considered a meaningful
18 examination of this issue, it was issued on August 11, 2016 — after the actions at
19 issue in this case — and unlike the Budget Act Amendment itself, the footnote does
20 not have retroactive effect. An agency rule does not have retroactive effect where it
21 “would impair rights a party possessed when he acted, increase a party’s liability
22 for past conduct, or impose new duties with respect to transactions already
23 completed.” Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). Here, the
24 FCC Rulemaking imposes additional burdens on loan servicers. The FCC
25 Rulemaking, then, could only be applied retroactively if Congress expressly
26 conferred that power on the FCC and the FCC clearly intended the rules to have
27 retroactive effect. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09

28 ⁴ Henderson’s suggestion that USAF engaged in “improper” conduct by not citing
“controlling FCC authority” (Opposition, p. 1) is absurd. As discussed, this
footnote is hardly controlling.

1 (1988). No such power was conferred by Congress, however. Instead, the
2 Bipartisan Budget Act simply states that the FCC shall prescribe regulations to
3 implement the amendments to the TCPA. It does not confer any authority to
4 promulgate retroactive rules. Similarly, even if such power was conferred by
5 Congress through the Bipartisan Budget Act, the FCC Rulemaking still would not
6 have retroactive effect because the FCC did not clearly state its intent for the FCC
7 Rulemaking to be applied retroactively. The FCC Rulemaking therefore is not
8 applicable here.

9 **B. Nevertheless, Even If The Calls Were Actionable, USAF Is Not**
10 **Vicariously Liable Under The TCPA.**

11 As noted above, in her Opposition, Henderson states that agency issues
12 involve a fact-based inquiry, which cannot be resolved at summary judgment. This
13 is an overstatement, of course. Courts have long held that summary judgment on
14 the existence of an agency relationship is still appropriate when the plaintiff fails to
15 meet her burden to show that a genuine issue of material fact exists. See Haas v.
16 Tucson, 84 Fed. Appx. 921, 922 (9th Cir. 2003) (granting summary judgment
17 where plaintiff failed to present proof of an agency relationship); Charbot v. Wash.
18 Mut. Bank, 369 B.R. 1, 20 (Bankr. D. Mont. 2007) (“The burden of proof to
19 establish an agency was on [plaintiff], and she failed her burden. . . . A summary
20 judgment motion cannot be defeated by relying solely on conclusory allegations
21 unsupported by factual data.”). Such is the circumstance here.

22 Indeed, as an initial matter, Henderson has not demonstrated the existence of
23 a dispute of material fact, and cites two decisions that are easily distinguishable.
24 (Opposition, p. 8). In Harris v. Itzhaki, 183 F.3d 1043, 1054 (9th Cir. 1999), the
25 determination at issue related to the very specific definition of agency set forth in
26 regulations promulgated by the Department of Housing and Urban Development,
27 meaning that a specific, factual analysis was critically important. Likewise, Fresno
28

1 Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119 (9th Cir. 2014), is not
2 even an agency case — it discusses general summary judgment standards.

3 Moreover, Henderson’s further arguments are equally unavailing. As
4 discussed below, summary judgment is appropriate for USAF here because (1) the
5 Collectors are not “subagents” of USAF; (2) no theory of implied actual authority
6 lies against USAF; and (3) USAF did not ratify the Collectors’ actions.

7 **1. The Collectors Are Not Subagents Of USAF.**

8 As a threshold matter, the Collectors cannot be USAF’s subagents unless NSI
9 is USAF’s agent for purposes of the disputed collection calls. See Restatement 3d
10 of Agency, § 3.15.⁵ Importantly, NSI is not a defendant here, and Henderson will
11 secure no binding rulings against it in this action. Moreover, as a matter of law, the
12 key element of a principal-agent relationship is control. “If the one who is to
13 perform the service is . . . not subject to control but is engaged to produce a certain
14 result by means and in a manner of his own choosing he is an independent
15 contractor.” Anderson v. Badger, 191 P.2d 768, 771 (Cal. App. 1948); see also
16 Thomas v. Taco Bell Corp., 879 F. Supp. 2d 1079, 1085 (C.D. Cal. 2012); Figi
17 Graphics, Inc. v. Dollar Gen. Corp., 33 F. Supp. 2d 1263, 1266 (S.D. Cal. 1998).
18 Very clearly, there is no evidence in this record demonstrating that USAF controls
19 NSI with respect to the Collectors’ calls.

20 Further, in attempting to distinguish this case from Thomas and Makaron v.
21 GE Sec. Mfg., No. CV-14-1274-GW (AGRx), 2015 WL 3526253 (C.D. Cal.
22 May 18, 2015), Henderson acknowledges that those courts found a lack of agency
23 because “the defendant could not control the manner and means of the
24 telemarketing campaign” or “control the specific telemarketing practices at issue.”
25

26 ⁵ Henderson’s contention that USAF waived the argument that no agency
27 relationship exists between USAF and NSI (Opposition, n. 8) is without merit.
28 USAF clearly argues in its Motion that USAF has no direct or vicarious liability
here, and now properly addresses the points raised by Henderson in the Opposition.

1 (Opposition, p. 18). However, Henderson then claims that this case is different
2 because “USAF audits the Collectors’ debt-collection practices . . . and has
3 suspended placements where Collectors have engaged in improper collection
4 efforts.” (Opposition, p. 18). [REDACTED]

5 [REDACTED]
6 [REDACTED].⁶ Accordingly, just
7 like the plaintiffs in Thomas and Makaron, Henderson has not cited a single
8 example of USAF exercising control over the “manner and means of the
9 telemarketing campaign” or the “specific telemarketing practices at issue.”
10 (Opposition, p. 18). [REDACTED]

11 [REDACTED]
12 [REDACTED] Default loan servicing is an extremely
13 complicated task that is governed by numerous regulations and statutes, some of
14 which require oversight by USAF. See, e.g., 34 C.F.R. § 682.410(b). But the
15 TCPA is not one of those statutes. That is why, in terms of calling practices, NSI is
16 an independent contractor who “is not subject to control but is engaged to produce a
17 certain result by means and in a manner of [its] own choosing,” as are the
18 Collectors, in turn. Anderson, 191 P.2d at 771.

19 In addition, Henderson contends that the numerous and various requirements
20 in the contract between USAF and NSI somehow indicate that NSI is USAF’s
21 agent. (See, e.g., Opposition, pp. 12, 17). Again, none of those requirements has
22 anything to do with the manner and means of the Collectors’ calling practices.

23
24
25 ⁶ [REDACTED]
26 [REDACTED]
27 [REDACTED] However, this relies on the
28 false assumption that the “improper collection efforts” had anything to do with the
TCPA. (See USAF’s Response to Plaintiff’s Facts (“USAF’s Response”), ¶ 43).

1 Moreover, as set forth in the Motion, there are many, demonstrated ways in which
2 USAF had no control over NSI. (Motion, pp. 9-10).⁷

3 But, even if there was any legitimate doubt as to whether NSI was USAF's
4 agent, this case is clearly distinguishable from Aranda v. Caribbean Cruise Line,
5 Inc., 179 F. Supp. 3d 817 (N.D. Ill. 2016), which Henderson says is "strikingly
6 similar." In Aranda, the relevant contracts specifically provided that the alleged
7 subagent "would solicit[] survey takers by transmitting or causing to be transmitted
8 prerecorded survey messages using an autodialer." Id. at 821 (emphasis added).
9 The subagent also was required to provide the defendant with "an exact telephone
10 script along with an exact audio file of each survey." Id. at 832 (emphasis added).
11 There was even evidence that one of the defendant's attorneys proposed edits to the
12 script before use. Id. Thus, the defendant not only controlled, but specifically
13 dictated the means by which calls would be made and what the content would be.
14 That is not the situation here. USAF retained NSI as an independent contractor to
15 service defaulted FFELP loans, and there is no evidence suggesting that USAF
16 controlled or dictated the manner of making, or the content of, calls through NSI (or
17 the Collectors, for that matter).

18 **2. Henderson's Implied Actual Authority Theory Is Defeated.**

19 The fundamental factor in an implied actual authority analysis is the alleged
20 agent's state of mind. See Penthouse International, Ltd. v. Barnes, 792 F.2d 943,
21 947 (9th Cir. 1986) (holding that implied actual authority exists where the alleged
22 agent believed he had authority, and that belief was reasonable). Thus, for the
23 Collectors to be agents of USAF here, the Collectors would have to reasonably

24 ⁷ Henderson's suggestion that actions in this litigation demonstrate agency are
25 similarly without merit — for instance, that USAF's expert was retained by NSI.
26 (Opposition, n. 10). As with every other aspect of this case (including NSI's status
27 as an independent contractor, rather than an agent of USAF), the agreement
28 between NSI and USAF governs. Under the agreement, NSI is required to
indemnify USAF in this action.

1 believe that they had authority to act as agents for USAF. Put simply, Henderson
2 has not presented any evidence so much as even suggesting such a belief (and,
3 indeed, she has not taken the depositions of any of the Collectors). Further, based
4 on the express terms of the governing contracts, such a belief would be more than
5 unreasonable; it would be irrational. [REDACTED]

6 [REDACTED] [REDACTED] Thus, no
7 reasonable Collector could have believed that it was USAF's agent here.

8 **3. Henderson's Theory Of Ratification Likewise Fails.**

9 Initially, Henderson's ratification theory of agency fails because there is no
10 principal-agent relationship in place here. "Although a principal is liable when it
11 ratifies an originally unauthorized tort, the principal-agent relationship is still a
12 requisite, and ratification can have no meaning without it." Makaron, 2015 WL
13 3526253 at *10; see also Restatement 3d of Agency, § 4.03, Comment b. As
14 explained above, there is no principal-agent relationship between USAF and the
15 Collectors (or NSI), so Henderson does not meet this prerequisite.

16 Even if such a relationship existed, USAF could not be found to have ratified
17 the Collectors' calling activities here because USAF lacked the requisite
18 knowledge. "A person who has ratified is not bound by the ratification if it was
19 made without knowledge of material facts about the act of the agent or other actor."
20 Restatement 3d of Agency, § 4.06(b). Henderson contends that the requisite
21 knowledge should be inferred because USAF unreasonably failed to investigate the
22 Collectors' conduct. However, there is no evidence establishing that USAF had
23 reason to believe that the Collectors were making calls in violation of the TCPA
24 (and USAF does not concede any such violations at this time, either). [REDACTED]

25 [REDACTED]
26 [REDACTED] Thus, Henderson improperly
27 seeks to foist this supposed responsibility to investigate on USAF.

1 In addition, Henderson identifies various “facts” that she claims are evidence
2 that USAF knew, or should have known, about the nature of the Collectors’ calling
3 practices. But Henderson’s assertions of “fact” are misleading, inaccurate or have
4 nothing to do with calling practices. For example, Henderson cites her statement of
5 material facts to contend that NSI takes steps to ensure compliance with state and
6 federal laws “like the TCPA.” (Opposition, p. 22). Obviously, what NSI would
7 have done proves nothing as to USAF. However, this also is misleading because
8 nothing in the record indicates that the TCPA was a focus of NSI’s actions. Rather,
9 Henderson adds the phrase “like the TCPA,” without an evidentiary basis. (See Pl.
10 Facts, ¶¶ 69, 71.) Similarly, Henderson’s assertion that USAF would “simply look
11 the other way” if faced with a borrower complaint about telephone calls is
12 particularly inflammatory. (Opposition, p. 23). USAF testified — very clearly —
13 that it would refer borrower complaints to NSI for handling, per the servicing
14 agreement in place between them. (See USAF Response, ¶ 69.)

15 Finally, Henderson’s citation to Aranda to support the argument that USAF
16 “knowingly” benefited from the Collectors’ supposedly improper conduct is
17 incorrect. In Aranda, the court found that “[t]here is even evidence that all three of
18 these defendants became aware of the possibility that some or all of the calls being
19 made were unlawful under the TCPA and that each of them continued to accept
20 business flowing from the campaign.” 179 F. Supp. 3d at 833. No such evidence
21 exists here, and Henderson’s ratification theory fails.

22 III. CONCLUSION

23 For the foregoing reasons, and those set forth in the Motion, USAF
24 respectfully requests that the Court grant the Motion.

25 Dated: December 23, 2016

VEDDER PRICE (CA), LLP

26 By: /s/ Lisa M. Simonetti

27 Lisa M. Simonetti

28 Attorneys for defendant USAF

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/s Lisa M. Simonetti

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